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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Charles R. Breyer, Judge

United States of America,)	
)	
Plaintiff,)	
)	
VS.)	NO. CR 14-0196 CRB
)	
Leland Yee and Keith Jackson,)	
)	
)	
Defendants.)	
_____)	

San Francisco, California
Monday, February 22, 2016

TRANSCRIPT OF PROCEEDINGS

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1 Monday - February 22, 2016

2:00 p.m.

2 **THE CLERK:** Calling case CR 14-0196, The United States
3 of America versus Leland Yee, Keith Jackson.

4 Appearances, counsel. Please come up to the podium.

5 **MS. BADGER:** Good afternoon, Your Honor.

6 Susan Badger, William Frentzen, and Waqar Hasib on behalf
7 of the United States.

8 **MR. CHATTERJEE:** Good afternoon, Your Honor.

9 Raj Chatterjee here on behalf of Keith Jackson.

10 **MR. LASSART:** Good afternoon, Your Honor.

11 James Lassart appearing on behalf of Leland Yee.

12 **THE COURT:** Good afternoon. I note that the
13 defendants aren't present, and it's my intention to discuss a
14 scheduling matter as distinct from anything of substance.
15 However, this is being memorialized by the court reporter so
16 there will be a transcript of it.

17 And this is why I want to discuss it with the government
18 and with counsel for Mr. Yee and Mr. Keith Jackson.

19 Over the last few days, quite a few days, I've been
20 reading the presentence materials, the reports, the memoranda,
21 the guidelines, you know, preparing for the sentencing hearing
22 which is scheduled for Wednesday.

23 It is obvious anyone looking at it would see that there's
24 a substantial dispute between the parties as to the guideline
25 range. And obviously -- well, I can say two things. Number

1 one, under the law the Court must resolve any disputes as to
2 the guideline range where they are certainly relevant factors
3 with respect to sentencing.

4 The exercise that the Court follows, and I think it is the
5 one that's appropriate, would be the first thing you do is set
6 the sentencing guideline range, and then you weigh that
7 determination along with five or so other factors which are
8 listed in 3553(a), including the characteristics of the
9 defendant, the history, the nature and circumstances of the
10 events, et cetera, et cetera.

11 Okay. So it's one factor among other factors that the
12 Court -- that is, the sentencing guideline range is one factor
13 among other factors that the Court would consider in imposing a
14 sentence. As such, I think that it's clear that the parties
15 are entitled to have a correct -- at least what the Court
16 considers to be a correct sentencing guideline range.

17 After having said that, and added to it the fact that
18 there are substantial disputes between the parties as to what
19 is the appropriate sentencing guideline range, I wanted to make
20 the following suggestion, which is: That under 6A1.3, the
21 Court has the power and is required to conduct some type of
22 hearing where there are disputes of relevant factors that would
23 be considered by the Court in determining the sentence. That
24 hearing is not like most other hearings in any Court
25 proceeding. Number one, the rules of evidence don't apply.

1 Number two, the standard that is to be applied by the Court is
2 one based upon a probability of truth of the assertion, as
3 distinct from preponderance of the evidence. It may be
4 preponderance and probability are one and the same, I've never
5 quite figured out the distinctions. But it's certainly not
6 beyond a reasonable doubt and it's not clear and convincing.
7 It's a much more relaxed standard.

8 So I think that's a correct statement of the law and where
9 we are.

10 Now, it also occurred to me that the defendants in this
11 case -- I'm talking about your clients -- have entered a plea
12 of guilty. That is done for a variety of reasons, one of which
13 is that there's not been a public parade of all of the evidence
14 that the government believes to be incriminatory and perhaps
15 contextual in any given situation because it's not necessary in
16 light of the fact that a defendant has pled guilty to the
17 offense.

18 If a hearing takes place of the type that I've described,
19 then to some extent, depending on what the evidence is, that
20 benefit, if it's a benefit, has been eliminated. That is to
21 say, witnesses come, they're cross-examined. The rules of
22 evidence don't apply. It becomes a very different kind of
23 hearing than at trial, but it has the same impact in some
24 measure of presenting evidence, or whatever one wants to call
25 these things, facts, impressions, circumstances, that the

1 defense, by virtue of the pleas, have set aside or have not
2 required any showing in light of the guilty plea.

3 So the question is, in the Court's mind, what does the
4 defense want to do? Not actually soliciting the government's
5 views. Nor am I soliciting your views today. Okay. Because I
6 think in any event, it's something that you have to talk to
7 your -- one, you have to think about it, and number two, you
8 have to talk to your client, and I think that this sort of
9 thing is the client's call.

10 Looking at -- let's take Senator Yee for a moment. The
11 Probation Department has found that he's in adjusted offense
12 level 29. They're using criminal history category one,
13 adjusted offense level 29, that the range is 87 to 108 months.

14 The government has asked for 96 months.

15 **MS. BADGER:** I don't think that's right.

16 **THE COURT:** Is that correct?

17 **MS. BADGER:** Your Honor, I apologize. I did not bring
18 up my copy of the final draft of the PSR, but there was an
19 adjustment. I thought it was --

20 **THE COURT:** Well, I may not -- I have --

21 **MS. BADGER:** I'm sorry.

22 **THE COURT:** I have the report of February 10.

23 **MS. BADGER:** 70 to 87 months comes to mind.

24 **THE COURT:** Wait a minute, wait a minute. Thank you.

25 Let me look. I must have either copied it incorrectly or I

1 have the wrong report.

2 **MS. BADGER:** There was a revised version filed on
3 February 17th.

4 **THE COURT:** And what is it? I'm sorry. Is it
5 adjusted offense level 29?

6 **MS. BADGER:** Well, I'm sorry, I don't have my copy.
7 It was adjusted downward -- if anybody -- nobody has their
8 guidelines.

9 **THE COURT:** Well, what do you think it is?

10 **MS. BADGER:** It came out to -- I believe it was 70 to
11 87 months.

12 **THE COURT:** Well, 70 to 87 months would be 27.

13 **MS. BADGER:** That sounds right. With the acceptance
14 of responsibil --

15 **THE COURT:** The final adjusted offense level 87 -- I
16 mean, 27. Well, okay, wait a minute. Let me just -- let's
17 assume that's what it is for the sake of this discussion.
18 Nobody's bound by it. Nobody's bound by it. Okay?

19 Okay. If it's 27 and one, that would be 70 to 87 months.
20 The government recommendation, though, is what?

21 **MS. BADGER:** 96 months.

22 **THE COURT:** Okay. So an upward?

23 **MS. BADGER:** Correct.

24 **THE COURT:** An upward departure.

25 **MS. BADGER:** Correct.

1 **THE COURT:** Okay. And I want to set aside upward
2 departures for a moment.

3 The defense has said that the sentencing guideline range
4 is 51 to 63 months, I think.

5 **MR. LASSART:** Correct.

6 **THE COURT:** And so that would be -- 51 to 63, and that
7 would be 24.

8 **MR. LASSART:** 24.

9 **THE COURT:** Since I haven't seen this memorandum, or
10 at least I don't have it in mind, does the government take the
11 position -- maybe I should have done Keith Jackson first. Does
12 the government take the position that the recommendation of 96
13 is an upward departure?

14 **MS. BADGER:** It is an upward adjustment, Your Honor.
15 We agreed with the calculation of 70 to 87 months.

16 **THE COURT:** Okay. So here is my point. My point is
17 that if the defense does not challenge the offense level 27,
18 which presently they do, but doesn't challenge that for
19 purposes of sentencing, I don't have to have a sentencing
20 hearing on all of these issues relating to was it correctly
21 calculated.

22 And the reason I'm saying that is because since I would
23 consider all of those other factors, five of them in number, I
24 think, in imposing a sentence, I, for one, don't believe that I
25 would attribute more weight -- I mean, I can assure you that I

1 would not attribute more weight than the sentencing guideline
2 range, whatever it is, to the other factors.

3 So what I'm saying is its role in this sentencing process,
4 while it has a role, isn't the predominant role necessarily.
5 It is simply one of the parts to it. And I would also say that
6 however the evidence worked out, whatever it was, obviously
7 that would be considered by the Court.

8 So where I am today is I consider the submissions that
9 have been filed without looking at an evidentiary hearing.
10 Everybody has made their arguments. Your argument is there's
11 no evidence that it was 200 weapons or more. You have other
12 arguments, but that's a principal argument. There are other
13 arguments that you make as well. And I have whatever the
14 record is in front of me.

15 Obviously, if that record is challenged and we have an
16 evidentiary hearing, then it's whatever comes out at the
17 evidentiary hearing. Okay.

18 So let me put you aside, Mr. Lassart, for a moment and
19 talk to Mr. Chatterjee.

20 Let's take your case. Your case, unless I got this one
21 wrong as well, is that the Probation Department found that the
22 guideline range was adjusted offense level of 33 and the
23 guideline range was 135 to 168. Is everybody on the same page
24 there?

25 **MR. CHATTERJEE:** That sounds correct to me,

1 Your Honor. I don't have the brief in front of me, but that
2 sounds right.

3 **THE COURT:** All right. The government has made a
4 recommendation of 100 -- well, the plea agreement, unlike
5 Mr. Lassart's situation where he did not agree to a range in
6 the plea agreement, you did.

7 **MR. CHATTERJEE:** Correct.

8 **THE COURT:** And the plea agreement is 72 to 120
9 months.

10 **MR. CHATTERJEE:** Six years to ten years, yes.

11 **THE COURT:** Pardon me?

12 **MR. CHATTERJEE:** Yes, six to ten years.

13 **THE COURT:** Yes. The government recommends 120, the
14 defense says 72. And what you would have to agree to, if you
15 wanted to avoid, I think, the sentencing hearing on the
16 guideline range is agree that you would not object if a
17 guideline range was set at 30. Because 30 encompasses your
18 plea agreement. I mean, it's one month over, but no one cares
19 about that. I say nobody cares about it. I can tell you a
20 long story about somebody who did care about it, but it's
21 not -- for these purposes, it makes no difference.

22 And so what I'm saying in so many words is I'd like you to
23 figure out whether you want to proceed by way of a sentencing
24 hearing that would be in the form of an evidentiary hearing in
25 which your various objections to the sentencing guideline

1 calculation are aired, considered for the purpose of setting
2 the sentencing guideline range.

3 I, again, will say that it is my view that I can sentence
4 based upon the proposal that I have stated, that is, that a
5 party agrees not to a sentencing guideline range, but that they
6 would have no objection for purposes of sentencing that a
7 sentencing guideline range of, in Mr. Jackson's agreement, be
8 30, and I think in Senator Yee's, I have 28, one over what was
9 found by the Probation Department.

10 I think that's right. Have I said it right?

11 **MS. BADGER:** 27, I think, Your Honor.

12 **THE COURT:** Well, guideline range the Probation
13 Department found was 27. Well, let's see.

14 **MR. LASSART:** They adjusted down also one, I think.

15 **THE COURT:** Well, I may have to get the government's
16 consent on that, then.

17 **MS. BADGER:** We -- so we agree --

18 **THE COURT:** In other words, you are asking for a
19 departure.

20 **MS. BADGER:** Yes.

21 **THE COURT:** And so you are asking for a departure of
22 27. You're asking for a departure from the high of -- from the
23 70 to 87, you're saying 96.

24 **MS. BADGER:** Right. But we do agree with the
25 calculation. We think the calculation of the guideline

1 range --

2 **THE COURT:** Is 70 to 87 months.

3 **MS. BADGER:** Correct.

4 **THE COURT:** And what is your view as to that?

5 **MR. LASSART:** What, Your Honor?

6 **THE COURT:** Your view is either in agreement that the
7 range is 70 to 80 months -- no, you don't. You say it's 51 to
8 63.

9 **MR. LASSART:** It's 51 to 63.

10 **THE COURT:** Okay. So it is you that has to deal with
11 it.

12 **MR. LASSART:** Assuming the government is right, that's
13 right.

14 **MS. BADGER:** Well --

15 **THE COURT:** Well, you see, but it's not a question --
16 what I'm saying to you, it's not a question of who's right or
17 who's wrong because I don't know that until I have a hearing.
18 And the question is: Do you want to have the hearing? And
19 what I'm suggesting to you is that you can have the hearing,
20 highly appropriate to have the hearing, and then I will do my
21 best to set the sentencing guideline range and then I will do
22 the sentence after I take all the 3553(a) factors into account.

23 A second way to do it is to simply agree that you don't
24 object to what is proposed as a guideline range and continue to
25 argue your particular sentence that you think is appropriate.

1 I think for those purposes, obviously, if you do get into
2 that agreement, we would have to not have argument such as,
3 well, we're -- you know, look at the defense, they're arguing
4 for 24 months under the -- whatever it is, X number of months
5 under the guideline range.

6 I'm saying to you that there are factors in these two
7 cases that are actually of great significance that really do
8 control how the sentencing would work other than the fine
9 tuning of a sentencing guideline range. In Senator Yee's case,
10 it's because he's a -- you know, was a politician or was held
11 to elective office. That's a different -- even though of
12 course, public corruption and so forth and so on are
13 encompassed within the guidelines, but that is a significant
14 difference from the run-of-the-mill case.

15 So I don't know. You know, I don't know how you want to
16 come out. I know one thing is that if you do decide that you
17 want your evidentiary hearing, I do not believe it can be done
18 on Wednesday. I think I'm going to have to set aside some time
19 to have a full-blown evidentiary hearing because it's going to
20 take a considerable period of time to go through these things,
21 marshal the evidence, argue the evidence, and see if it ought
22 to be subject to -- you know, and see what the parties want to
23 do with respect to any witnesses.

24 **MR. CHATTERJEE:** Your Honor --

25 **THE COURT:** Yes, Mr. Chatterjee.

1 **MR. CHATTERJEE:** May I --

2 **THE COURT:** I mean, that's what I'm thinking about.

3 And the reason I put it on the table is basically a
4 scheduling -- first, a scheduling issue. And I don't think I
5 have these problems with either Randy Jackson or Marlon
6 Sullivan. They're in a separate category. But I do have them
7 with the submissions that I've received.

8 Mr. Chatterjee.

9 **MR. CHATTERJEE:** I just want to explore a third option
10 for consideration, and that is, at least with regard to
11 Mr. Jackson, I think there's two principal issues that go to
12 sentencing guidelines. One is, as Your Honor mentioned, the
13 number of guns involved in the conspiracy. And number two,
14 whether some of the charges that are to be dismissed is
15 relevant conduct under the sentencing guidelines for purposes
16 of count two, which is the campaign conspiracies. I think
17 those are the two principal issues. And the parties set forth
18 their positions in their papers.

19 And the third option I'm exploring is to submit to the
20 Court on the record that's been submitted and let the parties
21 argue their side and let the Court resolve the issue in lieu of
22 having an evidentiary hearing.

23 **THE COURT:** I think it's inconclusive. I mean, I
24 think you have objected to the -- you objected to this
25 evidence. So, I mean, how could I -- how can I under 6A1.3,

1 how can I do it? I don't think I can.

2 **MR. FRENTZEN:** That's accurate, Your Honor. I mean,
3 what happened here was that there were presentations of
4 evidence in the form of discovery. And the Probation Office
5 got that. The Probation Office received objections from
6 defendant Jackson with regard to these issues which are, at
7 their core, basically factual issues. The Probation Office
8 disagreed with them.

9 When we filed our sentencing memorandum, we relied on a
10 PSR that had made factual findings that we agreed with. So the
11 issue was then in the sentencing memo that they filed
12 contemporaneously with our sentencing memo, they reiterated but
13 added to those original objections that the Probation Office
14 had already resolved in the way that the government believed
15 that they should properly be resolved. And then they filed a
16 response, which candidly I was preparing a reply, which perhaps
17 now I don't necessarily need to go through but which was
18 largely a layout of factual matters.

19 But I tend to agree with the Court. If the issue is going
20 to be joined about the extent to which the -- for example, the
21 number of firearms was in fact prospectively 200 or more, or to
22 the extent to which the narcotics trafficking, firearms
23 trafficking, and murder-for-hire were integrated into the count
24 two conduct, which -- and one of the things is there is
25 conversation after conversation where the conversations bounce

1 around from narcotics trafficking to weapons trafficking from
2 the Philippines to Senator Yee needs money to -- et cetera,
3 et cetera, to the extent that we view them as relevant conduct,
4 but these are, at its core, factual matters. And so if it's
5 going to be joined, then we would tend to agree that we're
6 happy to lay it out for the Court, it's just going to take some
7 time.

8 **THE COURT:** Let me -- that is my view with respect to
9 the record. But let me add another factor.

10 It's hard for me to see any of the things that are
11 discussed in the presentence report and in the submission of
12 the government, as an example, that wouldn't have some
13 tangential relevance to the 3553(a) factors, that is to say,
14 that I'm supposed to look at the history and characteristics of
15 the defendant.

16 Now, it may be that your position is absolutely correct
17 that in terms of relevant conduct, it doesn't come in. But
18 because it doesn't come in as relevant conduct doesn't mean
19 it's excluded if it's of some significance, excluded from the
20 Court's consideration in fashioning the appropriate sentence.

21 **MR. CHATTERJEE:** We understand that.

22 **THE COURT:** So I'm trying to figure out what do you
23 gain? I mean, I hate to -- number one, I don't want to lead
24 you along to say that if you do X, you'll get a particular
25 sentence, if you do Y, you'll get a particular sentence. No.

1 I have to tell you my mind is open on the subject of the
2 appropriate sentence.

3 What I'm saying to you is that if in fact there is -- if
4 in fact these materials to some extent come in for the Court's
5 consideration as to the appropriate sentence, I don't know what
6 the big -- I don't know how to say it. I wonder whether the
7 dispute is really -- is really so crucial to the determination
8 of the appropriate sentence.

9 Now, it may look to you like, well, gee, the judge wants
10 to avoid work, or, you know, this whole thing is fraught with,
11 you know, quote, uncertainties that on an appeal if we're
12 unhappy with the result, we're able to challenge.

13 And to which I would say that may be the case, I don't
14 know. You haven't given up your right. I haven't looked at a
15 plea agreement. But I always take the position, much to the
16 consternation of the government, that if I make an error at the
17 time of sentencing, that's preserved. Putting that aside,
18 whether it is or not, I don't know, in the plea agreement. It
19 probably isn't, but that's another issue.

20 But it seems to me one thing I would say so you're not --
21 you know, you're not deceived is once I get my calculation and
22 so forth, if it's a contested calculation, I would also say
23 whatever weight I would give to the calculation and what weight
24 I give to all the other factors that are considered, you know,
25 it's one factor among others. And if it's an accurate

1 statement of the law that I would consider all these things or
2 can consider these things, then I have to wonder what is to be
3 gained by it. That's all I -- you know, that's what my present
4 thinking is.

5 Mr. Lassart?

6 **MR. LASSART:** Your Honor, what puts me in a dilemma is
7 that I'm hearing the Court say that they're treating the
8 sentence guideline calculations between the two parties,
9 because that's where we are, which in essence is a dispute
10 that's generated by the enhancement arguments. That's really
11 what's driving the sentence guideline difference between the
12 two parties. This is looking at this as if it were a disputed
13 fact, much like a summary judgment type of situation.

14 Now, I know you don't apply *Celotex* to criminal law, but
15 when I see a disputed fact like that, I have to be concerned of
16 what the Court's thought is on the dispute on the analysis
17 between the two sides with regard to the enhancement evidence.

18 And I understand what the Court is saying is the 6A1
19 analysis is -- or hearing is a way to generate in an
20 evidentiary format an ability for the Court to decipher or
21 choose, so to speak, where the enhancement lies to determine
22 what the guidelines are.

23 Now, I don't know how the Court is going to weigh the
24 guidelines so I'm -- that's where, if the Court were to say,
25 well, that is just another factor, like you said in the

1 beginning, that would be fine. But we all are -- I'm concerned
2 on my client's behalf. I don't know how that all fits, that's
3 my concern. And I don't know where the government is on that.
4 But I think that's where we are. We have two disputed analyses
5 on a factual basis that lead to two different guideline ranges,
6 and that's what's before the Court.

7 Now, I have -- I'm always loathe to throw things up in the
8 air and see what happens because I like a little more control
9 of that, but that's my problem. I'm just kind of giving the
10 Court back what my thoughts are on this. I don't know where I
11 would come down on it until I spoke to the client. I think I
12 know, but I'm thinking of the issues like, you know: Is there
13 a waiver in here somewhere? Who's going to get called as a
14 witness? All of those issues are percolating in this little
15 6A1 hearing. And there may be a critical witness that I can't
16 call because of their Fifth Amendment right.

17 Those are all the issues that this kind of an analysis
18 generates, Your Honor. I don't know if that helped or just
19 made it worse.

20 **THE COURT:** Well, you know, it helps explain to me why
21 it's a difficult decision for you to make because it's a set of
22 uncertainties. I don't have an answer for that.

23 I mean, I look at it and I've heard the evidence and read
24 the evidence. Let's take the gun enhancement as an example.
25 The defense points out nobody said 200 weapons. The

1 prosecution says, well, he talked about deals that would be
2 somewhere -- costing somewhere in the neighborhood of -- I'm
3 going to be wrong but I'd say a half million or a quarter
4 million -- half a million to two and a half million dollars,
5 and here's my expert's declaration that says that's got to be
6 at least 200 weapons.

7 Okay. Taking those two facts, taking those two views of
8 it, I don't know whether that's enough to come to a conclusion
9 based upon a preponderance of the evidence as to whether
10 that -- the people would understand that to mean 200 or more
11 weapons or whether they wouldn't. But what I'm saying to you
12 is it wouldn't make much difference to me. That's what I'm
13 saying. What I'm saying is I've heard the evidence. The
14 evidence said 200 on the one hand, and on the other hand they
15 were talking about large-scale arrangements. I don't know.
16 That's -- you know, sometimes that's just what the evidence is.
17 There it is.

18 Now, what do I do with that? It's hard, necessarily. And
19 I think, one, I wait. If I have an evidentiary hearing, I wait
20 and see exactly what is the record as to the 200 weapons.
21 Everybody flushes it out. In comes the person with the
22 testimony. Or in comes -- we play the recording or dot, dot,
23 dot, dot, dot. We do all that. And then I may be no better
24 off than I am today, or I may be better off, you know.

25 Okay. Or we leave it alone, and I just say, okay, that's

1 what it is. How does that fit into what the appropriate
2 sentence is?

3 I don't know how else -- I mean, it may be that we're all
4 sitting with different roles in this and trying to figure out
5 how to deal with it.

6 **MR. LASSART:** Your Honor, may I suggest this?

7 **THE COURT:** I don't fault anybody for teeing it up.
8 But having teed it up, I have to resolve it.

9 **MR. LASSART:** Your Honor, I guess my suggestion would
10 be, like most decisions that are hard, to delay them a little
11 bit. It seems to me that if this opportunity is out there, I'm
12 going to have to look at it and explain it to the client and
13 see what the client says before I can answer these questions.

14 **THE COURT:** No, I don't think you have to answer -- I
15 mean, it seems to me that you can -- I don't know on that. My
16 guess is that you will want to know before probably Wednesday
17 morning because you probably have people who -- I don't know
18 whether you expect to call any witnesses or people to get up
19 and speak or not. Maybe not.

20 **MR. LASSART:** I don't. I don't.

21 **THE COURT:** You don't. Well, okay. Let's say
22 Wednesday morning you simply say we're ready to proceed with
23 sentencing now, or there is a dispute, there remains a dispute
24 and so we need to have an evidentiary hearing to resolve the
25 dispute.

1 So I'm not trying to -- I'm sorry I didn't -- I mean, I
2 only turned to these materials last week, but, you know, the
3 more I read through them, and they're voluminous -- not
4 voluminous, but they're considerable -- the more I looked at it
5 trying to figure out how am I going to do it? How am I going
6 to do it?

7 You know, I'm willing to postpone the sentencing in either
8 or both of your cases. I'm willing to treat them differently.
9 You don't have to agree, the two of you, as to what should be
10 done, one or the other.

11 I don't know what else to do, you know. I sort of wanted
12 to do it without a circus of everybody being here because I
13 actually wanted you to be able to decide things based upon what
14 I call reasoned, thoughtful decision.

15 **MR. LASSART:** A little reflection.

16 **THE COURT:** Well, you know, it's tough. You know,
17 being a trial lawyer, you know, you make decisions all the
18 time. You have to make them quickly. Here you don't have to
19 make them so quickly. And believe me, I thoroughly understand
20 the significance of sentencing. It is -- you know, it is
21 obviously a significant deal.

22 So I think that's -- yeah, let me answer any questions. I
23 just don't want to get into the substance of any arguing
24 because your clients aren't here. That's why I toss out just
25 the procedural aspect.

1 **MR. LASSART:** I don't want to get into the substance,
2 Your Honor, but I am interested in the procedure and that's one
3 of the concerns I have. Who goes first in this hearing? Who's
4 the lead? I understand that probably the government because
5 they have a burden. We probably disagree that it's a
6 preponderance as opposed to clear and convincing, but that's
7 another issue that the Court has to deal with.

8 **THE COURT:** Well, as I understand the issue, it
9 becomes a clear -- it's not always a preponderance of the
10 evidence. To the extent that it is a significant increase in
11 the guideline range, a higher standard is used. So I think
12 that's correct.

13 **MR. LASSART:** And so the Court knows, it's not -- I
14 mean, if there's 200 guns, there's a 10-level raise. That's
15 what this -- this is a large amount of this issue. That's what
16 this -- the reason both sides are talking about this issue.
17 And that's where we are.

18 **MS. BADGER:** Although, I believe a less than
19 200 guns -- again, I apologize, I don't have my guidelines in
20 front of me, but there's still -- if some amount of guns are
21 contemplated, then there's --

22 **THE COURT:** Yeah, what is it?

23 **MS. BADGER:** -- another adjustment.

24 **THE COURT:** I had my guidelines.

25 **MR. FRENTZEN:** It's 2K2.1, Your Honor.

1 **THE COURT:** What?

2 **MR. FRENTZEN:** It's 2K2.1. I believe the next
3 drop-down is 100 guns, if I'm not mistaken.

4 **THE COURT:** And what is the enhancement at that?

5 **MR. FRENTZEN:** I think it would be two less levels if
6 it was 100.

7 **THE COURT:** 25 to 90, 96. There's no dispute here, is
8 there, that it was at least 25?

9 **MR. LASSART:** Well, you know, Your Honor, I think this
10 is a dispute --

11 **THE COURT:** Well, I'd go with the papers, but I think
12 there's no dispute.

13 **MS. BADGER:** Well, there was even -- Senator Yee
14 discussed at one point there was 100 rifles available. So --
15 and that's in our papers.

16 **THE COURT:** Well, let's say 25. We're really talking
17 about four -- four levels. So we're not really talking about
18 ten. What I'm saying is that what's in dispute is at most four
19 and possibly two. You have to -- these are all tradeoffs.

20 **MR. CHATTERJEE:** Well, I think we understand the
21 Court's concerns. I say when it comes to the guns, those are
22 just talk in the Philippines. There's no agreement as to any
23 number of guns or weapons or types of weapons. So we -- you
24 know, obviously we have to make a decision.

25 **THE COURT:** I think there was some discussion of types

1 of weapons.

2 **MR. CHATTERJEE:** Well, there was discussion. There
3 was lots of discussion. There was no agreement. There was no
4 confirmation of what they were going to do. It was -- there
5 was certainly discussion about it. There's no question about
6 that. But discussion itself is -- doesn't rise to the level of
7 the enhancement, in our view.

8 **THE COURT:** Well, if your view is accepted, which it
9 could be as a matter of law, as you state, the fact that
10 they're talking about AK47s, or whatever it is, and there were
11 these discussions can be considered by the Court in imposing
12 the sentence.

13 So it may not -- what I'm saying is all of this may not
14 translate into the guideline range, but it's not that it
15 wouldn't be considered in some form in trying to arrive at an
16 appropriate sentence.

17 **MR. CHATTERJEE:** Well, we'll certainly discuss this
18 with our client. And we understand the Court's questions.

19 **THE COURT:** Well, just let the government know. I
20 think, you know, let the government know, let me know. I'd
21 like to know, if at all possible, tomorrow at the end of the
22 day whether you want to proceed with sentencing on Wednesday if
23 you can't -- you'll have to be here on Wednesday in any event.
24 But if you feel that there ought to be some resolution of the
25 sentencing guideline range, then I will simply pick a date for

1 a hearing on those matters.

2 **MR. CHATTERJEE:** And at least I want to clarify for
3 Mr. Jackson. To avoid a hearing, under your view, we'd have to
4 not object to a range of 30?

5 **THE COURT:** Well, I looked at -- for whatever 120 is.
6 Everybody agrees -- we'll limit it to 120 -- is 30, adjusted
7 offense level of 30. It's now 33. The government states that
8 they're not asking for an upward departure, they're asking
9 actually for a variance down to -- down to 120 months or down
10 to 30. It is your view, however, that the guideline range is
11 lower. Okay. I don't know how else to deal with it.

12 **MR. LASSART:** Your Honor, can I ask you this?

13 **THE COURT:** You can ask me anything, Mr. Lassart.

14 **MR. LASSART:** It doesn't guarantee an answer, does it?

15 **THE COURT:** Well, it doesn't guarantee the right
16 answer, but you'll get an answer.

17 **MR. LASSART:** If there is no hearing requested, is it
18 the Court's thought that we have waived our objections?

19 **THE COURT:** Well, yes. I mean, I think you have to --
20 I think that what is incorporated in there is to the extent
21 your objections go to a guideline factor, you will have waived
22 it. Absolutely. Because I have to rule on the objection.

23 Now, it's easy to rule on should this language be in or
24 should this be out, so forth and so on. But where you object
25 to something that is part of the sentencing guideline range, I

1 would have to rule on it. And I'm seeking your opinion --

2 **MR. LASSART:** So if we waive the hearing, then we
3 would -- the Court would consider the fact that we waived
4 objecting to the guideline range.

5 **THE COURT:** Yes.

6 **MR. LASSART:** Okay.

7 **THE COURT:** I believe that's accurate. That you have
8 agreed not to object. You're not saying you think it's the
9 correct guideline range, but you are for -- like a guilty plea.
10 You're not even saying your client would necessarily be
11 convicted at trial, but a person who enters a guilty plea
12 admits certain facts, and I guess in my view pleads guilty
13 because he is guilty. But maybe that's a bad analogy.

14 But at any rate, yes, it is -- since your -- well, not
15 your client, but since Mr. Jackson agreed to a sentencing
16 guideline -- a sentence -- I mean, a sentence -- he didn't
17 agree to a guideline range, he agreed to a particular sentence
18 range, the way I view that is I view that that range is a range
19 of reasonable sentences.

20 **MR. LASSART:** So -- just so --

21 **THE COURT:** So I don't know -- in other words, for
22 example, I don't know -- let's say I sentence him to the upper
23 part of the range and he wants to appeal. I don't know how he
24 can appeal a sentence that's within the plea agreement unless I
25 incorporated some impermissible factor.

1 **MR. LASSART:** Your Honor, that's why we're different.
2 We don't have --

3 **THE COURT:** Well, you're different --

4 **MR. LASSART:** That's what I'm concerned about is I
5 have objected to the guideline range proposed by probation as
6 it stands today. Because we've said that the guideline range
7 is X and gave the Court our reasons. The Court has now offered
8 us a hearing on that. We decline to have that hearing. I'm
9 concerned that if I don't have a hearing, any objection I have
10 with regard to the -- that is above the range that we believe
11 is correct, I'll lose the right of an appellate issue on that.

12 **THE COURT:** Yes, and that's absolutely correct.

13 **MR. LASSART:** So, in other words, I'm being backed
14 into a hearing.

15 **THE COURT:** You're what?

16 **MR. LASSART:** I'm being backed into a hearing. I have
17 no choice.

18 **THE COURT:** Oh, well, that's up to you.

19 **MR. LASSART:** Okay.

20 **THE COURT:** That's up to you. It's entirely up to
21 you. I mean, the choice you have is whether you want a hearing
22 or not.

23 **MR. LASSART:** Or do I want to preserve the objections
24 or not.

25 **THE COURT:** Well, but you can't -- I mean, it's like

1 you say I'm going to object, which you do. And so it's my job
2 to say objection sustained, objection overruled.

3 **MR. LASSART:** Correct.

4 **THE COURT:** And all I'm saying is in order to say
5 those words, say those words, I need to have a resolution on an
6 evidentiary basis for saying whatever words I'm going to say,
7 whether objection sustained, objection overruled.

8 **MR. LASSART:** And I appreciate the Court telling me
9 because this gives -- I can discuss this with some meat on the
10 subject when I talk to my client about it.

11 **THE COURT:** As far as I'm concerned, the context where
12 we are today is we're heading for an evidentiary hearing, which
13 is why I brought you in. I thought, well, there are all sorts
14 of dynamics that operate in sentencing, not the least of which
15 is that some defendant may want to be sentenced. I'm not going
16 to remand the defendants. I'm going to give them a reasonable
17 period of time to surrender.

18 So it doesn't have an impact on that if you didn't want to
19 go ahead on Wednesday and have to surrender on Wednesday. No,
20 that's off the table. I'm not going to give them an extended
21 period of time. They're both going to jail. And I will give a
22 reasonable time so the BOP can designate an institution and so
23 forth. Okay. That's off.

24 So now you look at and say where do I want to be on
25 Wednesday? Probably somewhere other than here.

1 **MR. LASSART:** Oh, it will be interesting, I'm sure.

2 **MR. CHATTERJEE:** I think we understand that we won't
3 be calling witnesses on Wednesday morning.

4 **THE COURT:** No. Okay. So is that -- by answering --
5 does the government have any questions or observations you want
6 to make?

7 **MS. BADGER:** Your Honor, the only thought that comes
8 to mind, Your Honor, it sounds like there's going to be an
9 evidentiary hearing so perhaps we ought to just open up
10 calendars and discuss dates if --

11 **THE COURT:** Sure.

12 **MR. CHATTERJEE:** I don't want to show a predisposition
13 to one side or the other. We need to talk to our client. We
14 need to absorb this.

15 (Simultaneous colloquy.)

16 **THE COURT:** I mean, I think -- I've just sort of said
17 the obvious, what any person would say. Maybe not. Anyway
18 I've given you some impressions of where I think dates are.
19 And go talk to your clients and see what you want to do.
20 Nothing is going to be held against them. Having a hearing,
21 not having a hearing. It's their right.

22 I mean, you sort of have -- I'm thinking you sort of have
23 to think about what we're -- I don't know what you think about.
24 I'm not a defense lawyer. Okay.

25 **MS. BADGER:** So perhaps we could be notified by

1 3:00 o'clock tomorrow? Is that reasonable to notify the Court
2 and the government?

3 **THE COURT:** The reason I think it is of some
4 significance is that -- and why it ought to be done tomorrow is
5 that there may be people who would be coming in for the
6 sentencing of your clients that, whoever they are --

7 **MR. CHATTERJEE:** I think that's reasonable. By
8 3:00 o'clock we'll confer with the government and let the Court
9 know.

10 **THE COURT:** Is that okay, Mr. Lassart?

11 **MR. LASSART:** Somewhere between 3:00 and 4:00 because
12 I have something going, Your Honor.

13 **MR. FRENTZEN:** Your Honor, the only reason why I'm
14 hesitating is I know that -- you know, I'm putting something
15 together now for the Court in anticipation of Wednesday. And
16 if we move forward and I know that Mr. Lassart filed something
17 that was in response to our memorandum just today, and I
18 haven't even had an opportunity to look at it. So if there's
19 something in there that we need to address, I mean, if we don't
20 know, I guess we're just not going to know and we're going to
21 end up filing something perhaps unnecessarily. And that's my
22 only issue.

23 **THE COURT:** Well, I think that you prepare whatever
24 response you want to Mr. Lassart's memorandum.

25 **MR. FRENTZEN:** My point was we don't want to respond

1 to anything if we don't have to. But, you know --

2 **THE COURT:** Well, eventually, I mean, won't I have to
3 deal with those issues anyway?

4 **MR. FRENTZEN:** But if we're dealing with it through a
5 hearing, then it's a whole 'nother animal and we can just deal
6 with it then. But, you know, we'll take a look and if we feel
7 like we need to hustle something up for the Court, we'll do it.
8 It's just -- it may be an unnecessarily jammed up more
9 paperwork, but, you know, we do a lot of unnecessary paperwork.
10 So...

11 **THE COURT:** I don't actually have an answer. There's
12 no reason why I can't go on Randy Jackson and Marlon Sullivan.

13 **MR. HASIB:** I don't think there's any disputes.

14 **THE COURT:** I look at those, and there's one dispute
15 as to a criminal history point or something. But other than
16 that, I don't think it makes any difference.

17 **MR. HASIB:** Those should be ready for Wednesday.

18 **THE COURT:** Yeah. So I'm going to sentence those two
19 individuals in any event.

20 **MS. BADGER:** Okay.

21 **THE COURT:** Well, thank you very much.

22 (Proceedings adjourned at 2:51 p.m.)
23
24
25

CERTIFICATE OF REPORTER

I, KELLY SHAINLINE, Court Reporter for the United States District Court, Northern District of California, hereby certify that the foregoing proceedings in CR 14-0196 CRB, United States of America v. Leland Yee and Keith Jackson, were reported by me, a shorthand reporter, and were thereafter transcribed under my direction into text; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

A handwritten signature in cursive script that reads "Kelly Shainline". The signature is written in black ink and is positioned above a horizontal line.

Kelly Shainline, Court Reporter

Wednesday, March 9, 2016